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SUPREME COURT, U.S.

IN THE SUPREME COURT
OF THE
UNITED STATES

STATE OF ALABAMA, *

PETITIONER *

VS * NO. 81-1662

TIMOTHY CHARLES DAVIS, *

RESPONDENT *

*

REPLY BRIEF OF RESPONDENT TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT AND THE COURT OF CRIMINAL APPEALS OF ALABAMA

BRUCE M. GREEN
JAMES C. PINO
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TABLE OF CONTENTS

PAGE

Table of Contents i

Table of Cases. ii

Argument. 1

I. THIS COURT'S DECISION IN BECK DOES MANDATE THE REVERSAL OF THIS CASE WHICH WAS TRIED UNDER THE ALABAMA DEATH PENALTY STATUTE PRIOR THERETO

II. THE TRIAL AND SENTENCING PROCEDURES IN THE CASE AT BAR DO NOT COMPLY WITH THE TRIAL AND SENTENCING PROCEDURES REQUIRED BY BECK V. STATE

Conclusion. 4

Certificate of Service. 5

TABLE OF CASES

	PAGE
Beck v. Alabama	
477 U.S. 625 (1980).	1
Beck v. State	
396 So.2d 645 (1981)	3
Ritter v. State	
(S. Ct. Ala. 1981) 403 So.2d 154.	1, 2

ARGUMENT

I.

THIS COURT'S DECISION IN BECK DOES MANDATE THE REVERSAL OF THIS CASE WHICH WAS TRIED UNDER THE ALABAMA DEATH PENALTY STATUTE PRIOR THERETO

The question presented for review is whether the decision of this Honorable Court in Beck v. Alabama (447 U.S. 625 [1980]) requires the automatic retrial of all cases tried under the Alabama Capital Punishment Statute prior thereto without regard to the evidence. Counsel for the Respondent is unable at this time to agree with or dispute the statement of facts as contained in the brief of the Petitioner as counsel for Respondent has been unable to obtain a transcript of the Circuit Court trial proceedings herein at the present time.

Assuming arguendo that the statement of facts as set forth in the brief filed by the Petitioner is correct, it is the position of the Respondent that the Death Penalty Statute, under which the Respondent was tried, convicted and sentenced to die, did include the "Preclusion" clause, and that said "Preclusion" clause may have had a chilling effect by restricting the Respondent's defense with respect to proof of facts and circumstances which may have been sufficient to invoke lesser included offense instructions.

In Ritter v. State (S. Ct. Ala., [1981] 403 So.2d 154) the Alabama Supreme Court denied rehearing and remanded the case for a new trial. In an opinion in which he concurred in part and dissented in part with the decision in Ritter, Justice Jones, stated in part:

> "I would hold that the test for answering the issue here presented for our consideration is whether the evidence of record is susceptible of any reasonable hypothesis giving rise to the application of the Lesser Included Offense Doctrine. Because such hypothesis may arise from either the presence or the lack of evidence adduced at trial, this test cannot be met unless the record of trial affirmatively precludes every reasonable hypothesis other than that of the Defendant's guilt of the capital offense as charged. Any reasonable doubt must be resolved in favor of granting the Defendant a new trial."

In Ritter, the Defendant took the stand and testified. In the case at bar, the Respondent (according to the Petitioner's statement of the facts) did not take the witness stand. Therefore, it would seem clear that the Respondent's defense may have been unduly restricted by the "Preclusion" clause and as a result no testimony or proof was presented sufficient to invoke lesser included offenses instructions.

II.

THE TRIAL AND SENTENCING PROCEDURES IN THE CASE AT BAR DO NOT COMPLY WITH THE TRIAL AND SENTENCING PROCEDURES REQUIRED BY BECK V. STATE

In Beck v. State (S. Ct. Ala., [1981] 396 So.2d 645) the Supreme Court of Alabama set forth the requirements for trial and sentencing procedures required under Alabama's Death Penalty Act. The Court stated in part:

> "We now hold that all trials conducted under Alabama's Death Penalty Act shall be as follows: A guilt-finding phase and, if the Defendant is found guilty, a sentence-determining phase."

It is submitted that even if this Court finds that the Respondent herein was not unduly restricted in his defense due to the chilling effect of the "Preclusion" clause, that he would be entitled to a new trial on the issue of sentence and in accordance with the Supreme Court of Alabama's decision in Beck after remand.

CONCLUSION

In conclusion the Respondent, Timothy Charles Davis, respectfully submits that the decisions and opinions of the Court of Criminal Appeals and the Supreme Court of Alabama in this case are not in conflict with the prior decisions and opinions of this Honorable Court. For this reason Respondent submits that Writ of Certiorari is not due to be granted in this case.

BRUCE M. GREEN
Attorney for Defendant-Respondent

JAMES C. PINO
Attorney for Defendant-Respondent

CERTIFICATE OF SERVICE

I, Bruce M. Green, Attorney of Record for the Respondent, Timothy Charles Davis, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this 1 day of June, 1982, I did serve one (1) copy of the foregoing on the Attorney for the Petitioner, by mailing same to him, first-class postage prepaid and addressed as follows:

James F. Hampton
Special Assistant Attorney General
Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130

BRUCE M. GREEN

ADDRESS OF COUNSEL:

Suite 205
Shelby Medical Center
Post Office Box 766
Alabaster, Alabama 35007

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No. 81-1662

STATE OF ALABAMA *

PETITIONER *

VS *
TIMOTHY CHARLES DAVIS

RESPONDENT *

Motion For Leave to Proceed In Forma Pauperis

Comes now the Respondent, Timothy Charles Davis, in the above styled case and moves the Court for Leave to Proceed In Forma Pauperis pursuant to Rule 46 of the Supreme Court of the United States and as grounds therefor would show the Court as follows:

1. The Respondent in this case is indigent and is presently incarcerated on death row within the prison system of the State of Alabama.

2. That on February 2, 1982, the Honorable Bruce Green and the Honorable James Pino were appointed by the Circuit Court of Coosa County, Alabama, as counsel for Timothy Charles Davis for purposes of trial in the Circuit Court for Coosa County, Alabama, [a copy of said Order is attached hereto as Exhibit A].

3. That on March 22, 1982, the Honorable Bruce Green and the Honorable James Pino were appointed by the Circuit Court

of Coosa County, Alabama, to represent Timothy Charles Davis in connection with any and all appellant proceedings involving Timothy Charles Davis [a copy of said Order is attached hereto as Exhibit B].

Bruce M. Green, Attorney for
Respondent, Timothy Charles Davis

James C. Pino, Attorney for
Respondent, Timothy Charles Davis

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Motion for Leave to Proceed In Forma Pauperis on the Honorable James F. Hampton, Office of the Attorney General, 250 Administrative Building, 64 N. Union Street, Montgomery, Alabama 36104, by placing a copy of same in the U. S. Mail, postage prepaid on this the 5 day of May, 1982.

Bruce M. Green

Exhibit A

IN THE CIRCUIT COURT OF COOSA COUNTY, ALABAMA

STATE OF ALABAMA,)
) CRIMINAL CASE NO. CC-79-12
VS.)
)
TIMOTHY CHARLES DAVIS,)
DEFENDANT)

ORDER APPOINTING COUNSEL
AND SETTING ARRAIGNMENT DATE

This Court having previously allowed the attorneys of record for defendant, Timothy Charles Davis, to withdraw, it is necessary that other counsel be appointed to represent, assist and defend the defendant during all proceedings in this case, it is therefore;

CONSIDERED, ORDERED, ADJUDGED and DECREED by the Court as follows:

1. That Honorable Bruce Green, a practicing attorney who has more than five years practice and who practices at the Shelby County Bar and elsewhere, is appointed to represent, assist and defend the defendant, Timothy Charles Davis, on the capital charge made against him by the Coosa County Grand Jury.

2. That Honorable James Pino, a practicing attorney who has less than five years experience and who also practices at the Shelby County Bar and elsewhere is appointed as counsel for the defendant, Timothy Charles Davis.

3. That arraignment is set for February 18, 1982, in the Court-room of the Coosa County Courthouse at Rockford, Alabama, at 11:00 a. m.

4. That defendant and his appointed counsel shall be present at such arraignment.

5. That the Sheriff of Coosa County, Alabama, Honorable William A. Evans, is directed to obtain custody of the defendant from the

Alabama penal authorities and place him in the Coosa County Jail on such date as will assure his presence at his arraignment.

Done and Ordered at Chambers this 2nd day of February, 1982.

KENNETH F. INGRAM, CIRCUIT JUDGE

Exhibit B

IN THE CIRCUIT COURT OF COOSA COUNTY, ALABAMA

STATE OF ALABAMA,)
)
VS.) CRIMINAL CASE NO. CC-79-12
)
TIMOTHY CHARLES DAVIS,)
DEFENDANT.)

ORDER CONTINUING THIS CASE FOR ARRAIGNMENT
AND FOR MATTERS RELATIVE TO
APPELLATE PROCEEDINGS TO THE UNITED STATES SUPREME COURT

By Order of this Court dated February 2, 1982, Honorable Bruce Green and Honorable James Pino, practicing attorneys who have more than five years in the practice of law, were appointed to represent, assist and defend the Defendant, Timothy Charles Davis, on the capital charge made against him by the Coosa County Grand Jury. The defendant's arraignment was set for February 18, 1982, but at the request of defendant's counsel joined by the district attorney the Court continued the arraignment generally. During the intervening time between February 2, 1982 and this date the Court is informed that this case has been appealed to the United States Supreme Court by the Attorney General of Alabama. This Court is not informed at this time officially as to whether or not the State's Petition for Writ of Certiorari to the United States Supreme Court will be granted. But pending such determination by that Court, it is the opinion of this Court that this case should be continued on the docket until such time as disposition can be made of it in accordance with the opinion of the United States Supreme Court, it is therefore;

CONSIDERED, ORDERED, ADJUDGED and DECREED by the Court as follows:

1. That this case is continued generally in accordance with the above stated information.

2. That the defendant shall remain in the State Penal System until the further order of this Court.

3. That the previously appointed Attorneys of Record, Honorable Bruce Green and Honorable James Pino, shall constitute the Attorneys of Record for this defendant for all proceedings, whether appeal or trial; that such appointment began on February 2, 1982 and will continue for all purposes until changed or modified by some subsequent order of this Court.

Done and Ordered at chambers this 22nd day of March, 1982.

KENNETH F. INGRAM, CIRCUIT JUDGE

